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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

FREDERICK THOMAS PORTE,

Defendant and Appellant.

G055315

(Super. Ct. No. 16NF2081)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard M. King, Judge. Judgment affirmed and remanded for resentencing.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Matthew Mulford, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Defendant Frederick Thomas Porte, armed with a knife, chased a neighbor. The neighbor was a trained fighter, younger, and in better shape, and successfully avoided defendant's attack. Defendant challenges his conviction for assault with a deadly weapon on the ground that there was no evidence of a present ability to harm the neighbor. We conclude that chasing someone with a knife, while at a distance of about 10 feet, constitutes a present ability to cause injury.

Defendant also argues the trial court erred by permitting the prosecution to impeach him with evidence of two prior theft-related offenses. Although these offenses were remote in time to the current offense, the trial court properly weighed defendant's lengthy time in custody and sanitized the description of the offenses to avoid undue prejudice.

Finally, statutory changes in the discretion given to the trial court to strike prior serious felonies requires that we remand the matter to the trial court so that it may, in the first instance, choose how to exercise that discretion. Therefore, we remand the matter for resentencing, but otherwise affirm the judgment.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On July 22, 2016, Aaron Rashad Gill had a fight with his live-in girlfriend, Mischa Thomas. Thomas left their apartment but returned a short time later with defendant, who lived in the same apartment complex. Although Gill had deadbolted the door, it was forced open. Gill saw defendant running away from the apartment and screamed at him, "Hey, did you just kick down my door?"

Defendant came toward Gill, grabbed him by the shirt, and threw a punch at him. Gill hit defendant twice in the chin, which "put him down to the ground." Defendant walked or crawled towards his car, where he retrieved a knife with a four to six inch blade. Defendant said, "I'm going to get you, motherfucker. I'm going to get

you,” and ran toward Gill with the knife extended. At this point, defendant was about 10 feet away from Gill. Gill ran toward the parking lot and zigzagged between cars to avoid defendant. Defendant stopped following Gill and went back to his car; he drove away with Thomas.

An upstairs neighbor who witnessed the incident testified she called 911 after Gill’s front door was knocked down. While on the phone with the 911 dispatcher, the neighbor saw defendant pull a knife out of his pocket and chase after Gill; at that point, the two were about a car’s length apart. The neighbor then saw Gill run away from defendant and begin to weave between parked cars to get away from defendant.

A responding police officer did not see any injuries on either defendant or Gill. Defendant told another officer he did not have a knife during the incident.

Defendant testified in his own defense that when Gill knocked him down, defendant’s three-to-four inch pocketknife fell out of his pocket. Defendant further testified he got up and chased Gill one time around the back of defendant’s car with the pocketknife in his hand.

Defendant was charged in an information with one count of assault with a deadly weapon. (Pen. Code, § 245, subd. (a)(1).) The information alleged that defendant had two prior strike convictions (*id.*, §§ 667, subds. (d) & (e)(2)(A), 1170.12, subds. (b) & (c)(2)(A)), one of which was a serious felony (*id.*, § 667, subd. (a)(1)), and that he had three prior felony convictions for which he served separate terms of imprisonment and failed to remain free of prison custody for the relevant period. (*Id.*, § 667.5, subds. (a) & (b).) A jury convicted defendant of assault with a deadly weapon. In a bifurcated bench trial, the court found all the prior offense allegations to be true.

Before sentencing, the trial court granted defendant’s motion to strike the non-serious felony prior strike enhancements and the prosecution dismissed one of the prior prison term enhancements. The court then sentenced defendant to a total term of

eight years in prison—the middle term of three years for assault plus five years for the prior serious felony enhancement. Defendant timely filed a notice of appeal.

DISCUSSION

I.

SUBSTANTIAL EVIDENCE SUPPORTED THE CONVICTION FOR ASSAULT WITH A DEADLY WEAPON.

Defendant argues that his conviction for assault with a deadly weapon must be reversed because there was not substantial evidence that he possessed the present ability to assault Gill, based on the distance between them during the incident, and Gill's superior strength, speed, and agility.

The evidence in this case is sufficient to support the conviction for assault with a deadly weapon, despite the fact defendant was never less than a car's length away from Gill. This court recently reiterated that, for purposes of assault, the present ability to commit an injury need not be an immediate ability to do so.

“[The defendant] argues that a person with a knife who is standing 10 to 15 feet away from a police officer . . . may never be convicted of aggravated assault because the person will never, as a matter of law, have the requisite “present ability” to commit a battery.’ . . . [¶] To establish a violation of section 245, subdivision (c), among the elements that must be proven are those of assault. This includes demonstrating that the defendant had the ‘present ability . . . to commit a violent injury.’ [Citations.] To have a ‘present ability,’ there must be threat of “a present, and not a future injury.” [Citation.] However, immediacy is not required. [Citation.] ‘[W]hen a defendant equips and positions himself to carry out a battery, he has the “present ability” required . . . if he is capable of inflicting injury on the given occasion, *even if some steps remain to be taken*, and even if the victim or the surrounding circumstances thwart the infliction of injury.’ [Citations.] [¶] Defendant acknowledges the ‘many cases’ which have concluded that being “several steps away” from actually inflicting injury’ does not preclude a finding of

present ability, but he attempts to limit the application of that conclusion to scenarios involving a loaded gun. There is no such limitation. The interpretation of law issue involved in [*People v.*] *Chance* [(2008) 44 Cal.4th 1164] concerned the meaning of the phrase ‘present ability’ as applied to assaults, generally, not as to any particular weapon. [Citation.] And, although the factual situation presented in *Chance* involved a loaded gun, the Supreme Court cited with approval cases discussing other weapons, such as swords and hatchets. [Citations.] [¶] [*People v.*] *Yslas* [(1865) 27 Cal. 630] is a prime example. ‘In *Yslas*, the defendant approached within seven or eight feet of the victim with a raised hatchet, but the victim escaped injury by running to the next room and locking the door. *Yslas* committed assault, even though he never closed the distance between himself and the victim, or swung the hatchet.’ [Citations.] We decline to distinguish, as a matter of law, a situation involving seven or eight feet of separation between the perpetrator and the victim, from that involving 10 or 15 feet, as in the present case. Such is a factual matter within the province of the trier of fact.” (*People v. Nguyen* (2017) 12 Cal.App.5th 44, 48-49, fn. omitted.)

In this case, Gill’s superior well-being does not negate defendant’s present ability to have caused injury to Gill. Substantial evidence supports the verdict.

II.

THE TRIAL COURT DID NOT ERR IN PERMITTING THE INTRODUCTION OF EVIDENCE OF DEFENDANT’S PRIOR CONVICTIONS.

The trial court permitted the prosecution to impeach defendant with evidence of two prior convictions—a 2002 conviction for robbery and a 1991 conviction for theft. We review the trial court’s ruling for abuse of discretion. (*People v. Ledesma* (2006) 39 Cal.4th 641, 705.) A witness may be impeached with a prior felony conviction involving moral turpitude, unless the probative value of the evidence is substantially outweighed by the risk of undue prejudice. (*People v. Sapp* (2003) 31 Cal.4th 240, 289.)

In this case, the trial court engaged in the proper balancing of probity and prejudice. The court permitted use of the theft-related convictions because they bore on defendant's moral turpitude. The court avoided prejudice by limiting the prosecution to asking defendant if he had been convicted of a "theft-related offense." The court excluded mention of defendant's other prior convictions for domestic violence and aggravated assault, which were more similar to the current offense, and which could have left the jury to engage in an impermissible inference regarding defendant's character. (Evid. Code, § 1101, subd. (a).) Although the prior convictions occurred more than 10 years before the current offense, the trial court properly took into consideration the significant amount of time defendant had spent in custody.

Even if the trial court erred in permitting evidence of defendant's prior crimes for impeachment purposes, the error would be harmless. The prior convictions were admitted solely to challenge defendant's veracity. Defendant's veracity was already in question due to his statement to one of the responding officers that he did not have a knife, which was clearly contradicted by his own testimony that he chased Gill with his pocketknife. Further, the evidence of defendant's assault on Gill was significant. It is not reasonably probable the outcome would have been different if the court had not admitted the evidence of defendant's prior convictions.

III.

REMAND IN LIGHT OF SENATE BILL NO. 1393

On January 1, 2019, amendments to Penal Code sections 667 and 1385 became effective, which give sentencing courts the discretion to strike a defendant's five-year prior serious felony sentencing enhancement under section 667, subdivision (a). At the time defendant was sentenced in this matter, the statutes did not permit a sentencing court to strike a prior serious felony conviction. (See Pen. Code, former §§ 667, subd. (a)(1), 1385, subd. (b).)

In this case, the trial court exercised its discretion to strike defendant's two prior strike convictions in the interest of justice.¹ Nothing in the appellate record indicates that the court would not have at least considered striking the serious felony strike if it had the discretion to do so. Therefore, we remand the matter for resentencing to permit the trial court to exercise its discretion whether to strike defendant's serious felony strike for sentencing purposes.

DISPOSITION

The matter is remanded for resentencing. In all other respects, the judgment is affirmed.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.

¹ In doing so, the court considered the following: The nature of the current offense was less serious than other felonies; there was no injury in the current offense; the priors were 13 years old; and defendant suffers from mental illness due to his military service in 1974.